INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	7
Conclusion	14
Appendix	15

CITATIONS

Cases:

Deputy v. *duPont*, 308 U. S. 488	13
Elmhurst Cemetery Co. v. *Commissioner*, 300 U. S. 37	12
Helvering v. *Kehoe*, 309 U. S. 277	12
Helvering v. *Taylor*, 293 U. S. 507	13
Interstate Circuit v. *United States*, 306 U. S. 208	10

Statute:

Internal Revenue Code:	
Sec. 2800 (26 U.S.C. 1946 ed., Sec. 2800)	15
Sec. 3612 (26 U.S.C. 1946 ed., Sec. 3612)	11, 16

Miscellaneous:

T. D. 5337, 1944 Cum. Bull. 674	11, 18

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 52

NICK W. MAROOSIS, PETITIONER

v.

JAMES G. SMYTH, UNITED STATES COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The oral opinion of the District Court (R. 295-306) is not reported. The opinion of the Court of Appeals (R. 321-331) is reported in 187 F. 2d 228.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1951. (R. 332.) The taxpayer's petition for a rehearing, filed March 12, 1951, was denied on March 14, 1951. (R. 333.)

The petition for a writ of certiorari was filed on May 7, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether the court below correctly affirmed the District Court's findings and judgment upholding the Commissioner's assessment of the additional floor stocks tax, and also the imposition of the 50% fraud penalty thereon, under the provisions of Sections 2800(k) and 3612(d), respectively, of the Internal Revenue Code, on the ground that the taxpayer knowingly and fraudulently failed to report a large quantity of distilled spirits on hand in his floor stocks tax return with intent to evade tax.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are printed in the Appendix, *infra*, pp. 15-20.

STATEMENT

The pertinent facts were summarized by the court below substantially as follows (R. 321-327):

The taxpayer was the proprietor of three retail liquor stores in San Francisco situated on Geary, Haight, and Fillmore Streets, respectively. (R. 3, 67, 325.) On May 1, 1944, in conformity with Section 2800(k) of the Internal Revenue Code which imposes floor stocks taxes on distilled spirits, he filed his return and paid the taxes in accordance therewith to the Collector. (R. 3, 20, 50-51.) The

return reported 1,330.36 proof gallons of distilled spirits on hand at his Geary Street store as of April 1, 1944, the tax date. (R. 3, 51.) The Collector found an underdeclaration of floor stocks and fraud in the return, readjusted the tax due upward, and assessed a penalty. (R. 3-4, 52.) The taxpayer paid in accordance with the Collector's findings (R. 4, 20), and brought suit for refund in the District Court (R. 2-19). The District Court, upon trial had without a jury (R. 22, 64), found in accordance with the Collector's determination (R. 52-53, 294-306), and the taxpayer appealed (R. 60, 321-323).

Disbelieving the amount of floor stocks reported by the taxpayer, and as indicated by the inventory taken by the Collector's agents, the Collector determined from a previous floor stocks tax return the taxpayer's opening inventory (631.93 proof gallons) on November 1, 1942. (R. 20, 51-52, 65, 235-236, 240-242, 244-245). From the records of wholesale liquor dealers, he ascertained the amount of distilled spirits purchased ($203,208.51) by the taxpayer from November 1, 1942, to March 31, 1944. (R. 66.) During the same period, the taxpayer's gross sales amounted to $276,328.51. (R. 66, 98-99.) By computing the percentage of gross sales which represented distilled spirits—stated by the taxpayer to be 86% (R. 252-253, 266)—the dollar amount of distilled spirits sold was determined, and this result was divided by the agreed average

selling price per proof gallon which yielded the figure 11,023.46, as representing the number of proof gallons of distilled spirits sold. Deducting this sum from the amount representing inventory plus purchases from November 1, 1942, to March 31, 1944, indicated that 2,553.21 proof gallons of distilled spirits was the gallonage on hand as of April 1, 1944. (R. 6, 13-14, 250-255, 264-266, 323-324.)

The method of computation outlined above showed an underdeclaration by the taxpayer of 1,222.85 proof gallons on his tax return.[1] (R. 6, 13, 52, 302, 324.) This underdeclaration of 1,222.85 proof gallons was used as the basis for the additional assessment made by the Collector. A penalty of 50% was added to the total amount of floor stocks taxes incurred, as provided for by Section 3612(d)(2) of the Internal Revenue Code.[2] (R. 6, 14, 52, 324.)

In March, 1944, Revenue Agent Hedrick of the Alcohol Tax Unit ascertained that the taxpayer had purchased 775 cases of whiskey which had been

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[1] The quantity of 2,553.21 proof gallons on hand as of April 1, 1944, minus 1,330.36 reported in the taxpayer's return, equals 1,222.85 proof gallons not reported. (R. 52.)

[2] The additional assessment of the floor stocks tax on the unreported distilled spirits on hand at the taxpayer's Geary Street store was made in the sum of $3,744.74, plus the fraud penalty of $4,733.91 and interest of $1,397.74, aggregating $9,876.39, which the taxpayer paid to the Collector in installments from June 15, 1946, to February 2, 1948. (R. 3-4, 20.) The taxpayer thereafter filed a claim for refund in the sum of $9,876.39 (R. 10-19) which was rejected on February 15, 1949 (R. 8), and the suit for refund was filed on June 22, 1949 (R. 2-19).

stored in a San Francisco warehouse. (R. 235, 246.) On the morning of March 31, 1944, the date the taxpayer's inventory was taken, Agent Hedrick and Inspector Arisco, another agent (R. 236), while driving past the Geary Street store, observed a large canvas-covered truck parked at the front. About an hour later the truck was driven to the San Francisco warehouse where the taxpayer's whiskey was stored. A coupe, known by Hedrick to be associated with the taxpayer's store, came to the warehouse, and the driver of the truck and the driver of the coupe had a conference while the cartons were being loaded on the truck. The truck and coupe left the warehouse and drove into a garage near the waterfront. There, Hedrick and Arisco observed the transfer of the cartons from the large truck to a small black panel-bodied truck that was also parked in the garage. The panel truck left the garage and Hedrick followed it to the basement garage of a residence on San Bruno Avenue.[3] (R. 245-248, 325-326.)

Agent Hedrick then rejoined Arisco near the garage where the large truck was located. This truck proceeded to the taxpayer's Geary Street store where cartons were taken from the truck and loaded into automobiles parked at the curb. The truck then proceeded to the taxpayer's Fillmore Street store where the driver removed four hand-truck loads of cartons from the store and placed

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[3] These premises were owned by one David Dellari. (R. 24.)

them on the truck. The truck was thereafter lost in traffic. Although Hedrick and Arisco continued to observe the taxpayer's three liquor stores, none of the cartons appears to have been taken into any of the stores. The records of the truck rental agency revealed that the truck had been returned shortly after Hedrick and Arisco had lost sight of it. (R. 248-250, 326.)

Although the taxpayer testified in his own behalf, he made no attempt to explain these occurrences, but his counsel elaborated upon his client's accounting system as based upon a daily perpetual inventory. (R. 127-139.) Neither the taxpayer nor his accountant gave any reason for the full itemization of the small sales in the daily sales book, while the larger sales were without mention except in the ledger. (R. 183-195, 205-206, 218-219, 227.) The taxpayer was asked to account for the fact that while for the five months prior to December of 1943 the total monthly sales never exceeded $15,003, yet in December they amounted to $62,946.84. (R. 190-192, 226-227.) The taxpayer stated that he had no records to show the subject of these and other large sales, or as to the sale price of any particular item of whiskey sold. (R. 136-137, 227, 326.)

Upon the basis of these facts, the District Court sustained the Commissioner's assessment of the additional floor stocks tax and the imposition of the fraud penalty in question, determined upon the

bases of the taxpayer's purchases and gross sales, and his failure to report the large quantity of diverted distilled spirits in his tax return, respectively. (R. 51-53, 295-306.) The court below affirmed. (R. 321-331.)

ARGUMENT

This case presents no question calling for further review by this Court. Substantially the only reason asserted by the taxpayer for allowance of the writ (Pet. 9) is that the court below erred in affirming the District Court's judgment sustaining the additional tax and fraud penalty solely on the basis of the presumption of correctness attaching to the Commissioner's determination, rather than on the evidence. The opinions of both lower courts fully disclose that there is no support for the assertion that the findings are not based on the evidence.

The Commissioner's determination of the additional floor stocks tax and fraud penalty resulted from the fact that the taxpayer had on hand on April 1, 1944, the tax date, but diverted to unknown destinations, large quantities of taxable distilled spirits greatly in excess of the number of proof gallons thereof reported in his return as of that date. (R. 51-53.) The testimony of the revenue agents who made the investigation and discovered the concealment of taxable liquor established that the unreported quantity thereof includible in the taxpayer's inventory for the taxable period

was determined, on the basis of all available records and ascertainable data, from the total money value of the taxpayer's opening inventory reported in his previous tax return on November 1, 1942, plus all his purchases ($203,208.51) for the seventeen-month period from that date to April 1, 1944, and subtracting therefrom his total gross sales ($276,-328.51) for such period. (R. 65-66.) This aggregate sum, converted into proof gallons on the basis of the taxpayer's own statement that the sales of distilled spirits constituted 86% of his total sales (R. 252-253, 266), disclosed 1,222.85 proof gallons which he had failed to declare in his tax return as of April 1, 1944 (R. 6, 52, 250-255, 264-266, 301-303, 323-324). The taxpayer introduced no evidence sufficient to indicate that the unreported distilled spirits thus determined were not on hand on the tax date (R. 52-53), that his books and records were correct (R. 297-298, 300-305), that the assessment was in any way arbitrary or excessive, or to show that the local assessment made by the California State Board of Equalization (R. 303), then unaware of the concealed stocks of taxable liquor, was correct under the evidence here.

As the District Court put it, it had "no confidence in the testimony" given by the taxpayer (R. 302) but that it did have confidence in that given by the revenue agents who investigated the case, to the end that it was "not able to say at all that the evidence disproves the assessment made by the collec-

tor" (R. 303); on the basis of the taxpayer's information admittedly given Revenue Agent Hedrick "that his distilled spirits sales were about 86% of his gross sales", Agent Hedrick was fully justified in determining, in corroboration of "what he himself had seen", that "there was a substantial shortage of about 1200 proof gallons" unreported in the taxpayer's return (R. 302); the fact that none of the whiskey moved out of the warehouse on March 31, 1944—the day before the effective tax date—was stored in any of the three places where the taxpayer claimed he kept *all* of his goods, nor was it listed, "destroyed the reliability of his inventory, his records and his claim of good faith" (R. 305); and the Collector was not bound by the State Board's audit of the taxpayer's books and the lesser assessment of local tax, without a finding of fraud, against the taxpayer there—not shown "at all" to be "correct" under the evidence here (R. 303). An examination of the record fully supports the District Court's characterization of the testimony.[4]

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[4] The taxpayer's accountant Bruch testified (R. 165; Pet. 7-8), and the taxpayer now contends (Br. 14, 18, 22-23, 25) that his "books and records * * * were true, complete and correct records", as shown by the State Board's audit resulting in a smaller assessment and no penalty (Pet. Br. 17-18, 23). The taxpayer's insistence (Br. 25) that his books and records correctly reflected his physical inventory of distilled spirits on April 1, 1944, as determined therefrom by the Collector's agents, is tantamount to saying that his tax return, in turn, was correct as filed. The District Court, however, found, upon the evidence (R. 255), directly to the contrary (R. 52, 299-300). The taxpayer himself concedes that at least "two hundred cases of whisky moved from the warehouse on March 31, 1944, were not reported on the return filed on

(E. g., R. 185-195, 209-212, 222-225, 250-255, 264-266, 282-283.)

In these circumstances, it was permissible for the court below to find, upon the record, that since the taxpayer's books contained insufficient and improper entries and failed to reflect the proper inventory, the Collector was justified in looking elsewhere for the evidence, including the taxpayer's own admissions, in order to make the computation in accordance with the method reasonably calculated to reflect the true figure, based on inferences properly drawn from the facts; and that inasmuch as the taxpayer had failed to explain the occurrences disclosing the concealed and unreported distilled spirits, as reported by the Collector's agents, as well as the omissions and inconsistencies in his books found by the trial court upon the evidence to be "wilfully inaccurate or incomplete" (R. 328), he has failed to demonstrate that the assessment was wrong or to establish his right to recover (R. 327-329).

Moreover, there is no error in the holding of the court below that the fraud penalty, assessed by the Commissioner and sustained by the District Court

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May 1, 1944." (Br. 15, 21-22, 29.) Moreover, as the District Court observed (R. 304), the taxpayer correctly represented that when one *should* offer evidence on an issue but fails to do so, it is reasonable to presume that such evidence, if offered, would have contradicted rather than supported his position. In the absence of any more convincing evidence, therefore, the taxpayer's "Silence then becomes evidence of the most convincing character." *Interstate Circuit* v. *United States*, 306 U. S. 208, 226.

(R. 53, 304, 324), was proper under the pertinent provisions of the statute and the Regulations. Section 3612(d)(2) of the Internal Revenue Code; T. D. 5337, 1944 Cum. Bull. 674 (Appendix, *infra*, pp. 17, 18-20). Upon a complete review of the evidence, the court below held as follows (R. 330):

> The intentional and deliberate omission of material facts from a report required by law constitutes fraud within the meaning of the internal revenue laws. *United States* v. *Fidelity & Casualty Co. of New York*, 3 Cir., 115 F. 2d 475 (1940). We hold that the district court's determination that the tax return was false and that taxpayer knowingly concealed and failed to declare the full measure of his floor stock was correct. * * *.

It was permissible for the District Court to find and conclude from all the evidence that the Collector's method of determining the taxpayer's omission, upon the basis of his own books and information, of 1,222.85 proof gallons of distilled spirits from his tax return "was the most reasonable and rationable one available to defendant under the circumstances" (R. 52, 302); that the taxpayer "knowingly, intentionally, wilfully and deliberately concealed and failed to declare in his * * * floor tax return * * * 200 cases of whiskey removed from the warehouse on March 31, 1944" (R. 53, 304); that the taxpayer's "tax return of May 1, 1944, was false and incorrect" (R. 52) and "was so made and filed with the intent of evading

the tax, and justified the Commissioner of Internal Revenue in levying an assessment upon plaintiff for the fraud penalty" (R. 53, 304); and that the Collector had fully sustained his burden of proving fraud [5] (R. 53, 304, 306).

Without reviewing the evidence in detail, it is clear on the record that the District Court made the only possible findings, namely, that the unreported 1,222.85 proof gallons of liquor in question represented taxable distilled spirits to the taxpayer as determined by the Collector, and that the taxpayer's omission of such amount from his tax return was due to fraud with intent to evade tax. (R. 52-53, 304.)

The District Court's findings with respect to the understatement by the taxpayer of his true distilled spirits' inventory on hand on the tax date and his fraudulent intent are questions of fact. *Helvering* v. *Kehoe,* 309 U.S. 277, 279; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, 40. Since these findings are fully supported by the record, the Court of Appeals correctly affirmed the

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[5] Since the taxpayer states that his books and records "fully disclose all information * * * needed to determine the correctness of petitioner's April 1, 1944, physical inventory", and that the Collector determined the unreported shortage in question accordingly "from the petitioner's books when the assessment was computed" (Br. 25), it would seem necessarily to follow that he thereby concedes such unreported shortage. It is significant in this connection, as shown, that the taxpayer now frankly admits that the undisclosed shortage of at least 200 cases of whiskey which were moved from the warehouse on March 31, 1944, were not reported on the return filed on May 1, 1944. (Br. 15, 21-22, 29.)

floor stocks tax assessment and the fraud penalty as found by the District Court.

The decisions cited by the taxpayer (Br. 20, 26-27, 29) involved different factual situations, and are not in any way in conflict with that in the present case. Indeed, the taxpayer does not assert a direct conflict. Thus, in *Helvering* v. *Taylor,* 293 U.S. 507 (Pet. Br. 12, 20-21), the evidence had established that the Commissioner's determination of income was arbitrary and excessive but did not show the correct income and tax liability. This Court held that remand to the Board of Tax Appeals for the taking of additional evidence as to the correct tax liability, was proper. In the present case, the Commissioner's determination of the assessment and fraud penalty was clearly not arbitrary or excessive. On the contrary, the taxpayer wholly failed to show that the Commissioner's determination and assessment of the floor stocks tax was excessive. Moreover, as this Court stated in *Deputy* v. *duPont,* 308 U.S. 488, 496, "Review of the many decided cases is of little aid since each turns on its special facts."

CONCLUSION

The decision of the court below is in all respects correct. It turns on the particular facts of this case, and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
S. DEE HANSON,
Special Assistants to the Attorney General.

JUNE, 1951.

APPENDIX

Internal Revenue Code:

SEC. 2800. TAX.

* * * * *

(k) [As added by Sec. 308(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21][6] *1944 Floor Stocks Tax.*—

(1) *Tax.*—Upon all distilled spirits upon which the internal-revenue tax imposed by law has been paid, and which on the effective date of Title III of the Revenue Act of 1943, are held and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor stocks tax of $3 on each proof-gallon, and a proportionate tax at a like rate on all fractional parts of such proof-gallon.

(2) *Returns.*—Under such regulations as the Commissioner with the approval of the Secretary shall prescribe, every person required by paragraph (1) to pay any floor stocks tax shall, on or before the end of the thirtieth day following the effective date of Title III of the Revenue Act of 1943 make a return and shall, on or before the first day of the third month following such effective date, pay such tax. Payment of the tax shown to be due may be extended to a date

[6] The Revenue Act of 1943 was enacted on February 25, 1944, and the floor stocks tax attached on April 1, 1944, as provided by Section 301.

not later than the first day of the tenth month following the effective date of Title III of the Revenue Act of 1943, upon the filing of a bond for payment thereof in such form and amount and with such surety or sureties as the Commissioner, with the approval of the Secretary, may prescribe.

(3) *Laws applicable.*—All provisions of law, including penalties, applicable in respect of internal-revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder. For the purposes of this subsection the term "distilled spirits" shall include products produced in such manner that the person producing them is a rectifier within the meaning of section 3254(g).

(26 U.S.C. 1946 ed., Sec. 2800.)

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

(a) *Authority of Collector.*—If any person fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise.

(b) *Authority of Commissioner.*—In any such case the Commissioner may, from his

own knowledge and from such information as he can obtain through testimony or otherwise—

(1) *To make return.*—Make a return, or

(2) *To amend collector's return.*—Amend any return made by a collector or deputy collector.

(c) *Legal Status of Returns.*—Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

(d) *Additions to Tax.*—

* * * * *

(2) *Fraud.*—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

* * * * *

(e) *Collection of Additions to Tax.*—The amount added to any tax under paragraphs (1) and (2) of subsection (d) shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax.

(f) *Determination and Assessment.*—The Commissioner shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section.

(26 U.S.C. 1946 ed., Sec. 3612.)

T. D. 5337, 1944 Cum. Bull. 674, 675-676, 677:

* * * * *

Sections 301 and 308 of the Revenue Act of 1943, passed February 25, 1944 (Public law 235, Seventy-eighth Congress), read as follows:

* * * * * .

Pursuant to the above sections of law, the following regulations are prescribed:

Distilled Spirits

Sec. 171.115. *Spirits Subject to Tax.*—The following kinds of distilled spirits, domestic or imported, among others, are subject to the floor stocks tax of $3 a proof gallon if tax-paid prior to April 1, 1944, and which on that date are held and intended for sale or for use in the manufacture or production of any article intended for sale:

* * * * *

(d) Whisky, gin, rum, and brandy.

* * * * *

(i) Distilled spirits of any description held by any person for use in the manufacture of any article intended for sale, regardless of whether the article to be produced is in itself unfit for beverage purposes.

Sec. 171.116. *Inventory of Distilled Spirits Required.*—Each distiller, fruit distiller, proprietor of an industrial alcohol plant, internal revenue bonded warehouse, alcohol bonded

warehouse, tax-paid bottling house, and each rectifier, wholesale dealer in liquors, retail dealer in liquors, manufacturer, or any other person, corporation, partnership, or association holding on April 1, 1944, tax-paid distilled spirits, including alcohol, intended for sale or for use in the manufacture or production of any article intended for sale shall, before beginning business on April 1, 1944, prepare an inventory of such tax-paid distilled spirits.

Sec. 171.117. *Preparation of Inventory of Distilled Spirits.*—(a) *Division into three sections.*—The inventory of distilled spirits will consist of three sections as follows:

Section 1. Distilled spirits on the premises of the taxpayer.

Section 2. Distilled spirits owned by the taxpayer and stored elsewhere.

Section 3. Distilled spirits owned by and in transit to or from the taxpayer.

* * * * *

(b) *Spirits stored elsewhere or in transit.*—Section 2, covering spirits owned by the taxpayer and stored elsewhere on April 1, 1944, and section 3, covering spirits in transit to or from the taxpayer on April 1, 1944, will contain the same columns as section 1, except that any column not applicable may be omitted. The address of each place of storage for spirits recorded in section 2 should be shown, as well as the serial numbers of all full cases. The means of transportation, name and address of

the consignor or consignee, and serial numbers of all full cases should be shown in section 3.

* * * * *

Sec. 171.118. *Computation.*—In computing proof gallons all decimals after three places shall be dropped. In computing tax, whole proof only must be used. * * *

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 52

NICK W. MAROOSIS,
Petitioner,

vs.

JAMES G. SMYTH, United States Collector of Internal Revenue,
Respondent.

PETITIONER'S REPLY BRIEF.

A. RUSSELL BERTI,
Mills Building, San Francisco 4, California,
Attorney for Petitioner.

MORRIS M. GRUPP,
961 Mills Building, San Francisco 4, California,

LEON SCHILLER,
105 Montgomery Street, San Francisco 4, California,
Of Counsel.

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Subject Index

Page

The brief for the respondent in opposition in effect supports the position of petitioner that there is no legal basis for the conclusion by the Court of Appeals that petitioner's books and accounts contained insufficient or improper entries 1

Respondent is in error as to the evidence necessary to sustain petitioner's burden of proof when respondent contends that "the taxpayer introduced no evidence sufficient to indicate that the unreported distilled spirits thus determined were not on hand on the tax date" (Resp. Br. 8)... 5

Respondent is in error when he states that petitioner concedes two hundred cases of whiskey were not reported in petitioner's return 8

Conclusion 9